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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1065

MARY V. CHANEY, PETITIONER

vs.

HOLLY STOVER, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HOLLY STOVER, RESPONDENT, OPPOSING GRANTING A WRIT OF CERTIORARI.

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INTRODUCTORY STATEMENT

The petitioner has printed as Appendix B to the Petition certain private correspondence of her attorney, which is not a part of the record. In footnote 3 of page 5, and footnote 8 of page 9, of the Petition, the petitioner calls attention to these letters as if they were a part of the record and as if this extraneous matter thus introduced might be considered.

At p. 6 of the Petition,, under the heading "Reasons for granting the Writ," the petitioner says that "while petitioner appealed from the order, no error was assigned to that holding and respondent did not cross-appeal," and accordingly the Circuit Court was without jurisdiction to reverse or modify the portions of the order favorable to the petitioner.

Reference to the brief filed by Holly Stover, appellee, in the Circuit Court of Appeals, pp. 12-18, shows that in fact the appellee assigned cross-error to the judgment appealed from.

STATEMENT OF THE CASE

The opinion of the Circuit Court of Appeals handed down December 28, 1946, not yet officially reported, at the time the judgment was entered, to review which a writ of certiorari is now prayed, briefly but sufficiently states the case. From that statement, the following facts among others appear:

The real estate here involved was appraised in July, 1942, at $5,500.00. Within six months thereafter the bankrupt secured a reappraisal, as a result of which the land was appraised at $10,720.00. The bankrupt is in possession and has paid no rent since January 20, 1944.

The judgment, to which a writ of certiorari is prayed, is in the petitioner's favor. It reverses the judgment of the District Court from which she had appealed. It frees the bankrupt from paying all rent accrued after January 20, 1944, over a period of nearly three years. It assured the bankrupt the opportunity to redeem the property "at its value at the time of redemption."

It overruled by implication only, the cross-error assigned by the appellee.

ARGUMENT

The petitioner's situation is anomalous in that the bankrupt is assailing a judgment in her favor and complaining, apparently, because her opportunity to redeem must be at the *present value* of the land.

It is respectfully submitted that the two "Reasons for Granting the Writ" (Petition, pp. 6-7) assigned by the petitioner are without merit.

The first "reason" assigned by petitioner is that the Circuit Court of Appeals was without jurisdiction to modify the judgment appealed from and to direct a determination of the value of the land involved.

In its opinion (Op., p. 7) the Circuit Court of Appeals says:

"as said in the opinion in the *Wright* case, *supra* (311 U. S. at 278) 'safeguards were provided to protect the rights of creditors throughout the proceedings, to the extent of the value of the property,' and this protection would not be afforded 'throughout the proceedings,' if at any stage it were possible for the debtor to redeem the property at less than its value at that time. Here it appears to the court that during a delay in proceedings there has been such a shift in property values that a prior appraisal of the property" (in this case, August 21, 1944) "cannot be relied upon for a determination of its present value, a new appraisal should be ordered. We think that power to order such reappraisal is implicit in the statute, and that, irrespective of the statutory provision with regard thereto, it inheres in the general equity powers which a court of bankruptcy exercises in the administration of the statute."

The statute (Section 75 (s) (3) provides:

". . . provided, that upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a day for hearing, and after such hearing, *fix*

the value of the property in accordance with the evidence submitted. . . " (italics supplied).

The Circuit Court of Appeals cited and quoted from the case of *Worley* v. *Wahlquist*, 8 Cir. 150 F. 2d, 1007, 1010, as follows.

"The statute purports to give an absolute right, on the timely request of either a creditor or the bankrupt himself, to have one reappraisal made in the proceeding or the value fixed on a hearing, before the court is required to enter any redemption order. The language used is that 'upon request of any secured or unsecured creditor, or upon request of the debtor, the court *shall* cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court' (emphasis added), if he desires to make a redemption. 11 USCA sec. 203, sub. s (3); and compare *In re Wright*, 7 Cir. 126 F. 2d 92, *certiorari* denied 317 U.S. 627, 63 S. Ct. 39, 87 L. Ed. 507. Whether any additional reappraisal or hearing to fix value should thereafter be had would seem to be wholly a matter for the court's sound discretion on the circumstances of the particular situation."

In *Haun* v. *Second Alliance Trust Co., Limited,* 9 Cir. 155 F. 2d, 618, the question involved was the power of the District Court to grant a reappraisal at the request of a secured creditor after the expiration of the three-year stay and after the debtor has paid into court the amount of the original appraisal. The Circuit Court of Appeals held that the court has authority to order such reappraisal. In the opinion (F. 2d, 619) it is said:

"It will be noted that the proviso relating to reappraisals does not in terms require that the request be made within the period of the stay. In the case of the debtor, however, he must necessarily ask a reappraisal within the period if he desires to redeem and is dissatisfied with the existing valuation placed upon the property. This compulsion grows out of the circumstance that his right to redeem is lost if not exercised within the time provided, unless at the termination of the period, reappraisal proceedings are pending. (*Fed. Farm Mortgage Corp.* v. *Paulsen*, 9 Cir. 149 F. 2d 897). But the creditor is not under similar compulsion. His role is passive. *Like the debtor, his right to a reappraisal is absolute* (italics supplied). But, unlike the debtor, he is not placed by the statute under the necessity of demanding the right within a fixed period of time. If he acts promptly after the debtor indicates his purpose to redeem, we think the Court is not only empowered, but is probably required, to cause a reappraisal to be made at the creditor's request. This would seem to be a rational interpretation of the statute, and is in line with the interpretation given it by the courts which have considered the problem."

In *Silver* v. *Rosenburg*, 2 Cir. 139 Fed. 2d, 1020, a question was whether the Circuit Court of Appeals has jurisdiction to modify an award of allowances by a referee in bankruptcy which has been affirmed by District Court, though ordinarily it will not interfere with such award. The Circuit Court of Appeals modified the District Court's judgment, saying:

"We have frequently refused to interfere with the award of allowances by a referee after affirmance by the District Court and in nearly all cases we can properly do

nothing else. Nevertheless, our jurisdiction does exist, and its existence presupposes that there may be occasions for its exercise. It seems to us, in spite of the triviality of the sums involved, that this is one of those occasions, and that it is not a sufficient answer that very little will be left in any event."

It will be seen that the action of the Circuit Court of Appeals here objected to in effect merely assures to the creditor an absolute right he enjoys under Section 75 (s) (3) of the Bankruptcy Act—the right, if and when the bankrupt, instead of merely declaring his desire to redeem, pays the redemption money into court, then to ask and to have a reappraisal, after which, if the reappraised value is greater than that at which the bankrupt has paid money into court, the excess is to be paid into court by the bankrupt.

The right of the creditor to ask a reappraisal after the bankrupt pays his money into court is referred to as absolute, for the right to a reappraisal is expressly given by the statute (Section 75 (s), (3) to the debtor *or* to any secured or unsecured creditor, and it is not possible, in justice to both debtor and creditor, that either party by speedy and premature action—in this case the debtor's and within six months after the primary appraisal—may by obtaining a reappraisal, wipe out the right of the creditor, upon the bankrupt's actually paying money into court, to have a reappraisal.

The action of the Circuit Court of Appeals was well within its power:

In *Denaro v. McLaren Products Co.*, 1 Cir. 9 F. 2d. 328, 330, it was said:

"We have authority under Section 129 of the Judicial Code (28 U.S.C.A., Sect. 227) to determine the case upon

its merits and save both time and expense which evidently both parties desired us to do, as they have argued the merits at length."

In *Highland Ave. and B. Ry. Co.* v. *Columbian Equipment Co.*, 168 U.S., 627, 630, it was said:

"On the hearing in the Circuit Court of Appeals, that court may consider and decide the case on its merits."

In the case of *In re Tampa Suburban Ry. Co.*, 168 U.S. 583, 588, it was said by Chief Justice Fuller:

"The case may indeed, on occasion, be considered and decided on its merits."

The second "question" presented is whether, under the facts of this case, the Circuit Court properly directed that the property be reappraised, or its value determined at a hearing. It is submitted that this question was exclusively a matter within the discretion of the Circuit Court of Appeals upon its consideration of the record, and in the absence of any intimation that the Circuit Court of Appeals has abused its discretion, this Court will not consider or interfere with its exercise of that discretion.

It is respectfully submitted on behalf of the secured creditor, Holly Stover, that this case is not one calling for the exercise by this Court of its supervisory powers, and that the writ of certiorari should not be granted.

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